Supreme Court, U.S.
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No. 95-1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DEBORAH A. SIMS,

Petitioner

v.

BROWN & ROOT INDUSTRIAL SERVICES, INC.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and the Fifth Circuit were correct in rejecting Plaintiff's argument for strict employer liability for *quid pro quo* sexual harassment and granting summary judgment in favor of Brown & Root based on its undisputedly prompt, complete remedial action in response to Plaintiff's complaint of harassment and the unique circumstances presented in this case.
2. Whether the District Court and the Fifth Circuit were correct in rejecting Plaintiff's argument that the hearsay knowledge of low level supervisors and the knowledge of the alleged harasser concerning his own conduct should be imputed to Brown & Root.

LIST OF PARTIES TO THE PROCEEDINGS

A. Petitioner (Plaintiff-Appellant below) — *Deborah A. Sims*, domiciled in Logansport, DeSoto Parish, Louisiana.

B. Respondent (Defendant-Appellee below) — *Brown & Root Industrial Services, Inc.*, a subsidiary of Halliburton Company, domiciled in Houston, Harris County, Texas, with offices in various states.

C. *Frank Brossette* — dismissed from the case and not the subject of any appeal.

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1. *Sims v. Brown & Root Industrial Services, Inc.*, 889 F. Supp. 920 (W.D. La. 1995).
2. *Sims v. Brown & Root Industrial Services, Inc.*, No. 95-30440 (summary calendar) (5th Cir. 1996) (not designated for publication pursuant to Local Rule 47.5).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in favor of Respondent Brown & Root on January 23, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner Deborah A. Sims ("Sims") sued her former employer, Respondent Brown & Root Industrial Services, Inc. ("Brown & Root"), for hostile environment and *quid pro quo* sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, and on various state law claims including intentional infliction of emotional distress. The District Court granted summary judgment for Brown & Root on all causes of action asserted by Sims. Sims appealed dismissal of her sexual harassment claims under Title VII, but not dismissal of her constructive discharge claim under Title VII or her various state law claims. The Fifth Circuit affirmed dismissal of Sims' hostile environment and *quid pro quo* sexual harassment claims under Title VII, concluding that the evidence undisputably established that Brown & Root took appropriate and prompt remedial action once it learned of the harassment. Fifth Circuit opinion at 1-2.[1]

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[1] The Fifth Circuit's opinion is reprinted in Appendix "A" hereto.

Petitioner's Statement of the Case, without citation to any record support, contains misstatements of the evidence, particularly (but not exclusively) with respect to the alleged conduct of Frank Brossett at a Brown & Root jobsite prior to the one on which he hired Sims. Brown & Root draws the following facts from the Memorandum Ruling of the District Court which granted its motion for summary judgment.[2]

Frank Brossett was a project manager for Brown & Root at its Olin Chemical Plant jobsite in Shreveport, Louisiana. Brossett interviewed Sims for a job assisting the purchasing agent. Afterwards, he telephoned Sims several times to pursue her romantically. Although Sims declined Brossett's advances, she was offered and accepted a job. District Court opinion at 2.

On her first day of employment, Sims was shown Brown & Root's policy prohibiting sexual harassment by the office manager, who discussed it with her. The sexual harassment policy, which was also posted at the jobsite, in addition to expressly prohibiting all forms of sexual harassment, included an open-door policy which allowed employees to present problems to any level of supervision or management, including the project Equal Employment Opportunity officer, and a 1-800 "hot-line" for reporting sexual harassment claims directly to the Corporate Human Resources Department. She did not, however, at that time, complain about Brossett's pre-employment behavior. District Court opinion at 2-4 and 19.

Sims was an assistant to the purchasing agent, a female, and spent almost no time directly with Brossett. She had contact with him only when her supervisor would send her to get Brossett's lunch order or to obtain information from him. Nevertheless, Brossett did manage to make unwelcome advances, mostly verbal, during these brief interludes. District Court opinion at 3-4. Brossett ultimately reassigned Sims and reduced her pay from $10.00 to $8.00 per hour for her failure to submit to his request for sex. Shortly thereafter, Sims complained about the sexual harassment to the office manager who had shown her the policy when she was

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[2] The District Court's opinion is reported at 889 F. Supp. 920 (W.D. La. 1995). For convenience, it is reprinted in Appendix "B" hereto.

hired.[3] The office manager immediately called the Human Resources Department at Brown & Root's main offices in Houston, Texas. That same day, a representative of the Human Resources Department telephoned Sims at her home and listened to her complaints. He told her that Brown & Root would investigate her claims, pay back any lost compensation if appropriate, and that she should let him know immediately if anything else happened. The following week, the first week of March 1993, a representative from the Human Resources Department traveled to the jobsite to investigate Sims' claim. As a result of this investigation, Brown & Root concluded that Brossett had sexually harassed Sims. Brossett was discharged on March 10, 1993 for violation of the company's sexual harassment policy. Sims was reinstated to her previous position and wage scale and was made whole for all lost wages resulting from her demotion. District Court opinion at 4-5, 18.

Sims resigned on May 19, seventy days after Brown & Root discharged Brossett. The Human Resources representatives involved in her situation had both advised her to contact them if she had any further problems at work. Yet, Sims never complained after Brossett's termination. She also had other employment already arranged at the time of her resignation, and the District Court found that there was evidence that this was the reason she left. With respect to her treatment after Brossett's discharge, Sims could only state that she felt "awkward" due to the "attitude" of two employees who happened to be related to Brossett. The District Court, based on Sims' own testimony, concluded that there was no credible evidence that work conditions were so intolerable that she was forced to resign. District Court opinion at 5, 25-26. Sims did not appeal this determination.

Contrary to statements in Petitioner's brief, there is no evidence in the record that Brown & Root was aware that Brossett had allegedly used his position to offer job inducements to female employees in return for sex or that a female employee was forced to

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[3] Sims may also have called Brown & Root's 1-800 "hot-line", which was published in its policy and was for the express purpose of making reports of sexual harassment.

have sex with him to keep her job. The District Court found that the evidence did no more than establish that two low-level supervisors at a prior jobsite had heard rumors or hearsay that Brossett had pursued romantic or sexual relationships with certain female employees. As the District Court observed, there is a notable absence of evidence in the record that any higher-level supervisor or immediate supervisor had knowledge of Brossett's alleged conduct at the prior jobsite. District Court opinion at 22. The District Court also found, with the exception of one discussion with a single employee, that Brossett's conduct was limited to asking female employees out on dates, albeit in a forward manner, and there was no evidence to suggest that the women were offended. Thus, the District Court concluded there was no evidence to support the suggestion that a hostile work environment existed at the prior jobsite which was so pervasive that Brown & Root should have known about it. District Court opinion at 22-23. The Fifth Circuit expressly stated that it had thoroughly reviewed the record and agreed with the District Court's determination as to what the evidence did and did not show with regard to Brossett's alleged conduct at the prior jobsite. Fifth Circuit opinion at 6.

ARGUMENT: THE PETITION SHOULD BE DENIED

I. The Decisions of the District Court and Fifth Circuit Are Consistent With *Meritor Savings Bank, FSB v. Vinson* and Title VII Principles.

Petitioner suggests that this Court should grant *certiorari* in this case for the purpose of announcing a bright line rule of strict liability on the part of an employer whose supervisor engaged in *quid pro quo* sexual harassment, without regard to whether the employer had knowledge of such misconduct or, once it gained knowledge, undertook prompt and effective remedial action. Such an absolute rule would go too far, conflict with this Court's jurisprudence, and be inconsistent with the policies underlying Title VII. Moreover, the facts established in the record below distinguish this case from all others where employers have been found liable for *quid pro quo* harassment. For these reasons, the petition should be denied.

A. The facts in this case are unique compared to other *quid pro quo* harassment cases where employers have been found liable.

The District Court had the following to say regarding Brown & Root's sexual harassment policy and the company's response to Sims' complaint:

> [I]t is apparent that Brown & Root's sexual harassment policy, which provides a clear avenue for all abused employees by way of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency.
>
> * * *
>
> Brown & Root acted as a responsible, exemplary employer by processing Sims' complaint swiftly, seriously, and, upon gathering the evidence in a thorough manner, decisively and justly. Sims was placed back in her original position, given lost back-pay, and Brossett was terminated.

District Court opinion at 19, 24.

The unique facts of this case, which prompted the District Court's above statements, set this case apart from others where employers have been found liable for *quid pro quo* harassment by supervisors. This includes those decisions in some circuits where the courts have suggested that employers are strictly liable for such harassment.[4] No other case addresses a situation where (1) the employer had in place clear policies and procedures that negated any actual or apparent authority on behalf of the offending supervisor; (2) the policy and the means for reporting a violation were known to the plaintiff at the time of the complained of conduct; (3) the plaintiff failed to make a timely complaint under the policy; (4) the plaintiff's eventual complaint was met with prompt and complete remedial action, including immediate reimbursement of lost compensation and restoration of status; and (5) the plaintiff was only subjected to an adverse employment action for a brief period of time prior to complete and effective remedial action. *Cf.,e.g.,*

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[4] See Petition at pages 6 and 8.

Karibian v. Columbia University, 14 F.3d 773, 776 (2d Cir.) *cert. denied* 114 S. Ct. 2693 (1994) (no evidence that employer had strong policy prohibiting sexual harassment, management representatives discouraged plaintiff from filing complaint of sexual harassment, and remedial action was not prompt).

Simply put, Brown & Root did everything that could be reasonably expected of an employer to prevent sexual harassment from occurring in its workplace and, when such harassment was reported under its policy and confirmed, to implement prompt and effective corrective measures that included make whole relief to the victim (restoration of prior job status with payment of lost compensation) and were designed to prevent the reoccurrence of such harassment (discharge of the offending employee). In such circumstances, the employer has acted responsibly, even commendably, and the dictates as well as the policies underlying Title VII have been met, rather than frustrated. There is no justification for imposing strict legal liability on employers in such situations:

> The work place is a complex and diversified community in which employees work closely and continuously in each other's presence over long hours, during which, experience has shown, inappropriate conduct occurs from time–to–time. While employers can and should be required to adopt reasonable policies aimed at preventing illegal conduct and to take reasonable measures to enforce these policies, they cannot be held to a standard under which they are liable for any and all inappropriate conduct of their employees. When presented with the existence of illegal conduct, employers can be required to respond promptly and effectively, but when an employer's remedial response results in the cessation of the complained of conduct, liability must decease as well. Employers cannot be saddled with the insurmountable task of conforming all employee conduct at all times to the dictates of Title VII, irrespective of their knowledge of such conduct or the remedial measures taken in response to such conduct.

Spicer v. *Commonwealth of Virginia,* 66 F.3d 705, 711 (4th Cir. 1995).

B. Petitioner's strict liability argument contradicts this Court's decision in *Meritor Savings Bank* and is not supported by Title VII principles.

This Court, in *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), declined to issue a definitive rule on employer liability for sexual harassment but emphasized that Congress had intended for courts to look to common law agency principles for "guidance in this area," noting, however, that "such common law principles may not be transferable in all of their particulars to Title VII." *Id.* at 72. The Court further held that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." Thus, this Court considered and rejected imposing strict liability on employers for sexual harassment committed by supervisory employees. While *Meritor Savings Bank* was a hostile environment sexual harassment case, the majority opinion does not reflect that this Court intended a different liability analysis where the harassment is *quid pro quo* rather than, or in addition to, hostile environment.

Nor should this Court establish separate and differing tests for employer liability under Title VII dependent on whether the alleged harassment is hostile environment or *quid pro quo*. The Court in *Meritor Savings Bank* emphasized that the employer's defense to liability would be "substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." 477 U.S. at 72-73. In particular, the Court suggested the need for a policy specifically addressing sexual harassment which alerted employees to their employer's interest in correcting that form of discrimination and a procedure for reporting sexual harassment that did not require the employee to complain first to her immediate supervisor. The Brown & Root policy meets the criteria suggested by *Vinson*, and such policies, which are designed to prompt internal complaints of sexual harassment, should not be discouraged by an automatic finding of unlawful conduct on the part of the employer when they work as intended and the employer acts responsibly.

Petitioner's attempt to differentiate between the two types of sexual harassment — by suggesting that the *quid pro quo* harasser wields the employer's authority to alter the terms and conditions of employment — is a distinction without substance. By definition, hostile environment harassment also involves an alteration in the terms and conditions of employment (i.e., the creation of an abusive work environment) and, where the victim's supervisor is the harasser, he wields authority to accomplish the altered work environment to the same degree as does the harasser who discharges or demotes his victim. The more pertinent question is whether the harasser, regardless of supervisory status, has acted on the *employer's* authority where a well-publicized policy prohibiting harassment exists and, when the misconduct is reported, the employer takes prompt and effective corrective action. *See discussion in part "c" infra.*

Neither do the available remedies under Title VII militate in favor of different liability tests. Because *quid pro quo* harassment involves actual or threatened tangible job-related detriment, the employer's obligation to take "full and effective" corrective action may include appropriate "make whole" remedies with respect to restoration to former status and rights and reimbursement for lost compensation. Where, however, the employer, as in this case, voluntarily takes such actions, there is no remedial purpose under Title VII left to be served that distinguishes *quid pro quo* harassment from hostile environment harassment. See *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988). *cert. denied* 489 U.S. 1020 (1989) (purpose of the remedial provisions of Title VII is "to restore the victim of discrimination to fruits and status of employment as if there had been no discrimination."); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied,* 113 S.Ct. 831 (1992) ("there may be a de minimus exception [to *quid pro quo* liability] for temporary actions, such as in this case, or where further remedial action is moot and no economic loss occurred."). The availability of compensatory and punitive damages, since the adoption of the Civil Rights Act of 1991, does not suggest the contrary, since these remedies are available for both types of harassment. *Quid pro quo* harassment is not intrinsically

more emotionally upsetting to the employee than hostile environment harassment. Indeed, Petitioner's own brief suggests that the hostile environment harassment she experienced, the dismissal of which she is not challenging, was more traumatic for her than the reduction in her hourly wage. Petition at 3.

Finally, if strict liability is to be the rule in *quid pro quo* cases, exaggerated and even fabricated allegations will be fostered. Virtually every hostile environment plaintiff will be tempted to assert a *quid pro quo* allegation in order to bootstrap into a strict liability mode. This will encourage unneeded litigation. Title VII itself discourages litigation by requiring complaint to the EEOC and a conciliation process before a complainant has the right to sue. *See,* 42 U.S.C. § 2000e-5; *see also Bouton v. BMW of North America, Inc.,* 29 F.3d 103, 110 (3d. Cir. 1994). Imposition of strict liability would undermine this policy favoring voluntary rectification of grievances over litigation. Further remedial action is moot because Sims has suffered no economic loss.

C. Agency law principles do not require or suggest different liability tests under Title VII for hostile environment and *quid pro quo* sexual harassment.

There can be no *actual authority* to engage in discriminatory and harassing conduct where the employer has adopted a clear policy prohibiting sexual harassment and a means of circumventing a direct supervisor to report conduct that is in violation of the company's policy. *See Gary* v. *Long,* 59 F.3d 1391, 1397-98 (D.C. Cir.) *cert. denied* 116 S. Ct. 569 (1995). Perhaps even more importantly in the instant case, Sims cannot claim that Brossett possessed the *apparent authority* to sexually harass because she was admittedly aware that Brown & Root's policy prohibited such conduct and that employees were required to report such conduct under the policy.

The general rule is that "a master is not subject to liability for the torts of his servants acting outside the course and scope of their employment. . . ." *Id., quoting Restatement (Second) of Agency § 219(2).* An exception to this general rule provides that the master may be held liable if "the servant purported to act or speak on

behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship." *Id., quoting Restatement (Second) of Agency § 219(2)(d).* The plaintiff in *Gary* v. *Long* argued that the supervisor was aided by his employer-delegated authority in carrying out the harassment. The District of Columbia Circuit rejected this argument because the plaintiff did not believe, nor could she have reasonably believed, that the supervisor was acting within his authority when she was aware of the policy prohibiting such conduct. 59 F.3d at 1398. The appeals court cited the well established agency principal that:

> If a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability.

Id., quoting Restatement (Second) of Agency § 166, cmt. a; see also Watts v. *New York City Police Dept.,* 724 F. Supp. 99, 106 n.6 (S.D.N.Y. 1989) (agency liability is appropriate only if the conduct is accomplished by a means furnished to the supervisor by his employer and the employer has not put in place strong policies and procedures that effectively belie the appearance of such authority).

The *Gary* court concluded that "an employer may not be liable for a supervisor's harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences." *Id.; see also Bouton,* 29 F.3d at 110 (an effective grievance procedure — one that is known to the victim and timely stops the harassment — shields the employer from Title VII liability for sexual harassment).

Further, while if left unremedied, *quid pro quo* discrimination may be viewed as accomplished through the authority vested in the supervisor by the employer, where the employer's corrective response includes retroactive as well as prospective elimination of any tangible detriment, this too makes clear (as well as the

employer's policy) that the *quid pro quo* discrimination was accomplished by the supervisor acting for his own personal gratification and not in the legitimate exercise of authority vested in him by the employer. In other words, the employer has repudiated (i.e., not ratified) the *quid pro quo* acts by restoring the victim to her original status and making her whole. Once the employer eliminates, both retroactively and prospectively, the effects of the tangible detriment flowing from the *quid pro quo* harassment, there is no legal or practical reason to differentiate between the two theories (hostile environment and *quid pro quo*) by holding the employer strictly liable in one but not the other.

Finally, an analysis of agency principles should not be undertaken in a vacuum without consideration of Sims' own responsibilities and conduct. Because of its normally covert nature, some of the responsibility for promptly reporting sexual harassment under a clearly delineated employer policy must be shared by the complainant. A prompt complaint from Sims would have enabled Brown & Root to halt the complained of conduct before her demotion and loss of pay. Sims knew of Brown & Root's policy prohibiting sexual harassment from her first day of employment and yet failed to report the harassment until after it became *quid pro quo*. Neither the principles of agency nor the principles of equity contemplate rewarding employees who refuse to avail themselves of the protection of a policy that is known to them at the time of the complained of conduct. Petitioner would have this Court impose a liability upon Brown & Root for unauthorized conduct that could have been avoided had Sims complied with her responsibility under the policy. To impose strict liability in these circumstances would discourage the diligent enforcement of policies prohibiting sexual harassment and would encourage plaintiffs like Sims to stockpile their grievances in anticipation of a lawsuit rather than to report sexual harassment immediately.

In sum, contrary to Petitioner's suggestion, the policies underlying Title VII would not be furthered by a rule of strict liability for *quid pro quo* harassment. Neither Title VII nor agency principles require or even suggest the desirability of different liability tests for the two types of harassment. Consequently, the Fifth Circuit's

decisions on this subject, which focus the liability analysis on the employer's proactive policy-making and prompt and effective response to complaints, are consistent with *Meritor Savings* as well as Title VII's goal of eliminating sexual harassment. In contrast, the rule advocated by Petitioner, which would penalize employers for unauthorized conduct and reward silence by potential plaintiffs, would foster litigation but not further Title VII's goal of eliminating sexual harassment in the workplace.

II. Petitioner's Second Question Is Nothing More than a Request for Review of the District Court's Evidentiary Findings, Which Were Expressly Affirmed by the Court of Appeals, and Which Are Unworthy of Review by this Court.

Petitioner's statement of her second question for review, as well as representations of the evidence contained in her brief, misstate the record.[5] The District Court reviewed the admissible evidence and rejected any suggestion that it raised a fact issue as to whether Brossett, at his prior jobsite, was offering female employees job inducements in return for sex or as to whether this was a fact known to management personnel. The District Court concluded that two lower level foreman had heard rumors regarding Brossett's solicitation of a few female employees, but also found that only one of the alleged incidents appeared to be of a sexual harassment nature. In any event, the District Court properly declined to find the existence of a genuine issue of fact, based on this hearsay and rumor knowledge of only two lower level supervisors, as to whether Brown & Root had actual or constructive knowledge of a propensity on the part of Brossett to sexually harass women employees. In this regard, the District Court emphasized that there was a notable absence of evidence that any higher level supervisor or immediate supervisor had any knowledge of Brossett's alleged conduct. The Fifth Circuit, in its opinion, expressed agreement with the District Court's determination based on its own thorough

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[5] Petitioner, not surprisingly, neglected to furnish any record support for these misstatements.

review of the record. The district and appeals courts' determinations were correct and, more importantly, do not raise any significant issue of law worthy of this Court's attention.[6]

CONCLUSION

Petitioner asks this Court to severely limit the principles that are articulated in *Meritor Savings Bank, FSB v. Vinson* by announcing an inflexible, absolute rule of employer strict liability in all cases where *quid pro quo* sexual harassment is perpetrated by the victim's supervisor. This would be both inconsistent with sound legal principles and unwise from a Title VII policy perspective, especially in the context of the facts of this case.

Neither should this Court devote its limited resources to reviewing evidentiary determinations made by the District Court and affirmed by the court of appeals based on both courts' careful review of the record evidence.

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[6] There was no evidence before the District Court that any complaint (prior to Sims') of sexual harassment was ever made against Brossett during his almost twenty years with Brown & Root. Although two of the three female employees that Brossett allegedly approached at the prior jobsite testified in deposition that he did express a romantic interest in them, both also stated that they did not feel that reporting such conduct was necessary because Brossett did not ask them out after they made it clear they were not interested. Neither alleged any *quid pro quo* harassment.

Respondent Brown & Root respectfully suggests that the Petition for Writ of Certiorari should be denied in all respects.

Respectfully submitted,



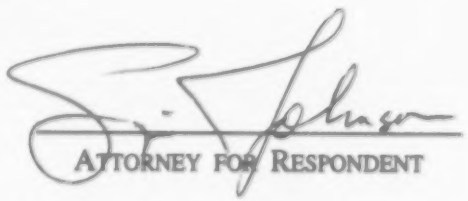
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CERTIFICATE OF SERVICE

I certify that on this the 2nd day of August, 1996, a correct copy of the foregoing Brief in Opposition to Writ of Certiorari has been forwarded to counsel for Petitioner by placing same in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

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ATTORNEY FOR RESPONDENT

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 95-30440
(Summary Calendar)

DEBORAH A. SIMS,

Plaintiff-Appellant,

V.

BROWN & ROOT INDUSTRIAL SERVICES INC.,

Defendant-Appellee,

AND

FRANK BROSSETTE,

Defendant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
(94-CV-708)

Before JOLLY, JONES and STEWART, Circuit Judges.
PER CURIAM:*

Deborah Sims was sexually harassed by the project superintendent at her job with Brown and Root Industrial Services ("Brown & Root"). When she reported the harassment according to the policy in place at Brown & Root, the claim was immediately investigated, the project superintendent was fired, and Sims's pay was reimbursed. Nevertheless, she brought suit against Brown & Root, alleging that she should not have had to prove a failure to take prompt remedial action, and that Brown & Root had constructive knowledge that the project superintendent involved pervasively sexually harassed women. The district court granted summary judgment for Brown & Root, and Sims appeals that decision. We AFFIRM.

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

FACTS AND BACKGROUND

Sims claims that project superintendent Frank Brossett made unwelcome sexual advances even before she was hired. Within a short time after her hiring, she was made aware of the policy at Brown & Root that provided a "hot line" to Human Resources for complaints for sexual harassment. Although Brossett's continued behavior was inappropriate and unwelcome — he propositioned her, called her mother and asked personal questions, and "banged" on her apartment door at odd hours of the night — she did not complain until he docked her pay by $2.00 per hour for refusing to have intimate relations with him. When she complained shortly thereafter, her complaint was immediately investigated, Brossett was dismissed, and Sims's back pay was fully reimbursed. Sims brought a sexual harassment claim under federal and state law against Brown & Root, state tort law claims against Brossett, and filed a third party demand against State Farm, Brown & Root's insurer. All of the claims were dismissed on summary judgment. Sims appeals only the dismissal of Brown & Root. She claims that she should not have been required to show that Brown & Root failed to take prompt remedial action. She also contends that the district court erred in finding that Brown & Root did not have constructive knowledge that Brossett sexually harassed women.

DISCUSSION

A grant of summary judgment is reviewed de novo under the same standard as that applied by the district court. *Ellert* v. *University of Texas, at Dallas,* 52 F.3d 543, 545 (5th Cir. 1995). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 273 (1986). Where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, then summary judgment should be granted. *Armstrong* v. *City of Dallas,* 997 F.2d 62, 67 (5th Cir. 1993). With these principles in mind, we now turn first to the legal issue

concerning sexual harassment law, and then to the mixed law-and-fact issue dealing with constructive knowledge.

Sims argues that she should not be required to show that Brown & Root failed to take prompt remedial action once they received actual or constructive notice of the sexual harassment. She argues that, regardless of the fact that Brown & Root took prompt remedial action, they should be held liable for Brossett's wrongful behavior on the grounds that he was a supervisor, rather than a co-worker and he controlled Sims' terms and conditions of employment. As pointed out by the district court in its memorandum opinion, the necessary implication of her argument is that Brown & Root should be held strictly liable for the wrongful behavior of its employee Brossett.

In *Nash* v. *Electrospace System, Inc.*, 9 F. 3d 401, 404 (5th Cir. 1993), this court explicitly rejected liability for employers in sexually hostile work environment claims brought under Title VII, stating that "[a]n employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate the hostile environment." The same denial of strict liability holds true in a *quid pro quo* sexual harassment claim because the elements of both claims are nearly identical.

The distinctions between claims of a sexually hostile environment and *quid pro quo* sexual harassment are outlined by this court in *Jones* v. *Flagship International*, 793 F.2d 714, 719-22 (5th Cir. 1986), *cert. denied* 479 U.S. 1065, 107 S. Ct. 952, 93 L.Ed. 2d 1001 (1987). The only difference between the two claims is that in a *quid pro quo* situation, the harassment complained of must affect tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. *Jones*, 793 F.2d at 722. In a sexually hostile environment, the harassment complained of must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. *Jones*, 793 F.2d at 719-20. Otherwise the elements of both claims are the same: 1) The employee belongs to a protected group, 2) The employee was

subject to unwelcome sexual harassment, 3) The harassment complained of was based upon sex, 4) The employer knew or should have known of the harassment in question *(respondeat superior)* and failed to take prompt remedial action. *Jones,* 793 F.2d at 719-22. Thus, while *Nash* addressed only a sexually hostile environment claim, *Jones* indicates that the plaintiff is required in both situations to prove a failure to take remedial action, and thus the *Nash* holding rejecting strict liability is equally applicable to a quid pro quo claim.

Moreover, common sense, as discussed both in the memorandum opinion and the amicus curie brief, dictate that strict liability should not apply to a sexual harassment claim and a plaintiff should be required to prove that the employer failed to take prompt remedial action. If the employer were to be held strictly liable even after having taken prompt remedial action, then he would have no incentive to take such remedial action, and no incentive to create effective policies in order to prevent such abuses. Holding a company liable after it has taken prompt remedial action would "produce truly perverse incentives benefitting no one, least of all actual or potential victims of sexual harassment." *Carmon* v. *Lubrizol,* 17 F.3d 791, 795-96 (5th Cir., 1994) Because Sims could not show that Brown & Root failed to take prompt remedial action, the district court made no error in holding that Sims's claims against Brown & Root failed.

Sims also claimed that Brossett's prior acts tend to prove that Brown & Root knew or should have known of Brossett's behavior at a much earlier date and failed to take prompt remedial action at that point. In *Waltman* v. *International Paper Co.,* 875 F.2d 468, 478 (5th Cir. 1989), a case dealing in part with a supervisor's sexual harassment of an employee, this court found that the plaintiff had shown actual knowledge on the part of an employer sufficient to withstand summary judgment review because she proved that she had complained to higher management. Moreover, this court also found that she had adduced sufficient summary judgment evidence to raise a fact issue with regard to constructive knowledge: constructive knowledge was inferred where there was sexual graffiti

directed at the plaintiff in numerous locations at her place of employment.

In the case at bar, despite her awarenesss of the policy prohibiting sexual harassment at Brown & Root, Sims did not pursue the procedure outlined by that policy until Brossett docked her pay, consequently, there was no actual knowledge on the part of Brown & Root of any harassment prior to that time. With regard to constructive knowledge, Sims presented the depositions of other employees who had said that they either were themselves propositioned by Brossett or knew of others who had been. Upon reviewing this summary judgment evidence, the district court found that the only supervisors who had heard "rumors" of Brossett's conduct were low-level foremen, and there was a notable absence of evidence that a higher level supervisor or immediate supervisor had knowledge of Brossett's alleged conduct. On this basis, the court found "as a matter of law" that Brown & Root had not had constructive knowledge that Brossett sexually harassed female employees, and then concluded that Sims failed to raise a genuine issue of material fact whether Brown & Root had knowledge of Brossett's prior conduct and failed to take prompt remedial action at that point. After a thorough review of the record, we agree, and therefore AFFIRM the granting of summary judgment to appellee Brown & Root.

APPENDIX B

United District Court

FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DEBORAH A. SIMS,

V. CIVIL ACTION NO. 94-0708
JUDGE TOM STAGG

BROWN & ROOT INDUSTRIAL
SERVICES INC., ET AL

MEMORANDUM RULING

Deborah Sims ("Sims") has brought a sexual harassment claim under federal and state law against Brown & Root Industrial Services, Inc. ("Brown & Root") and state tort law claims against Frank Brossett ("Brossett"), a former employee of Brown & Root. Brossett has, in turn, filed a third party demand against State Farm Fire & Casualty Company ("State Farm"), seeking coverage for the claims asserted by Sims. Brown & Root, Brossett, and State Farm each filed a motion for summary judgment. For the reasons set forth below, these motions are GRANTED and Sims' claims are DISMISSED WITH PREJUDICE.

I. BACKGROUND[1]

A. Facts

Brossett was a Project Manager for Brown & Root at the Olin Chemical Plant jobsite in Shreveport, Louisiana, when he interviewed Sims for a job assisting the purchasing agent in purchasing and receiving parts. After the interview, Brossett telephoned Sims at least two times per week for three consecutive weeks. The content of these telephone conversations apparently consisted of Brossett pursuing Sims romantically; he also invited her to have sex with him in exchange for employment. Brossett's

[1] For the purposes of this Memorandum Ruling only, the court will assume that Sims' deposition testimony relating to her Title VII claim is true.

comments to Sims on the date of her interview or via telephone include:

(1) that she needed either a "TV daddy" or a "sugar daddy"; and

(2) asking whether she "loved as good as she looked."

Although Sims declined his advances, she was offered a job with Brown & Root. She accepted the position and began work on September 17, 1992. When Sims arrived at work she was shown Brown & Root's policy prohibiting sexual harassment.[2] She did not, however, at that time, complain about Brossett's pre-employment behavior.

Sims was an assistant to Judy Ladner and spent almost no time directly with Brossett. She came into contact with him only when Ladner sent her to get Brossett's lunch order or to get some information from Brossett. Nevertheless, Brossett apparently managed to make unwelcome advances during these brief interludes. The following are some of the alleged acts Brossett made toward Sims once her employment began:

(1) Brossett asked on numerous occasions if he could come to her apartment;

(2) Brossett instructed some employees not to speak to Sims;

(3) Brossett patted Sims on the buttocks;

(4) when Sims asked Brossett what he wanted for lunch, he replied, "you." Sometimes he would mouth, "your body";

(5) Brossett asked Sims if she wanted to borrow money from him — if she would "pay him back";

(6) Brossett called Sims' mother to ask her mother about "very personal matters" regarding Sims;

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[2] Sims admits that on her first day of employment, Tracy Hood, the office manager, told Sims that Brown & Root had a policy prohibiting sexual harassment; Hood also showed Sims the policy. Additionally, Sims knew that the policy was posted on a bulletin board outside of the trailer office in which she worked.

(7) Brossett stopped by Sims' apartment and talked to Stacy Adams, Sims' apartment manager, and left his business card;

(8) Brossett told Sims on at least two occasions that he found her attractive by commenting that she looked good in her pants;

(9) Brossett instructed Sims to go to a motel; and

(10) Brossett reduced Sims' pay from $10.00 to $8.00 per hour for her failure to submit to his request for sexual favors.

Sims continued to work at her reduced rate of pay for approximately one month. Then, in the last week of February, Sims complained of Brossett's conduct, utilizing Brown & Root's sexual harassment policy. This policy provides, in pertinent part:

> If you believe you are being discriminated against you should implement the Open Door Complaint Policy by first discussing the matter with your immediate supervisor. If you are not satisfied with the response from using the chain of command, you should address your concern with the Project EEO Officer. If the problem is not resolved at that level, you should advise your Business Unit Personnel Manager and/or the Employee Relations/Compliance Department in Houston [the telephone number was inserted here]. Although we encourage you to resolve complaints using the chain of command, the Open Door Policy allows you to address problems to any level of supervision.

Deposition of Deborah Sims, at Exhibit 4 (December 20, 1994) (attached to Brown & Root Memo. Supp. Summ J.).

Sims made her complaint to a supervisor, Tracy Hood, who immediately placed a call to Greg Conklin at the Human Resources Department at the company's main offices in Houston, Texas. The same day, Conklin called Sims at her home and listened to her complaints. He told her that Brown & Root would investigate her claims, pay back any lost money if necessary, and that she should let him know immediately if anything else happened. True to his word, the following week, the first week of March, a representative from the Human Resources Department, Ralph Morales, went to the jobsite to investigate Sims' claim. Morales interviewed several

Brown & Root employees, including Sims and Brossett. As a result of Morales' investigation, Brown & Root concluded that "[t]here is an abundance of testimony regarding the conduct ... Brossett which makes a very strong case for quid pro quo type sexual harassment. Although Frank denies it, there are just too many people saying the same things about him." Brossett was terminated on March 10, 1993, the second week of March, for violation of Brown & Root's sexual harassment policy.

Additionally, Sims was reinstated to her previous wage scale and paid her unpaid past wages. After Brossett's termination, however, Sims claims that she began to feel "awkward" because of the behavior of two of Brossett's relatives who were still working at the jobsite. Without making any further complaints to Brown & Root, she resigned on May 19, 1993.

B. Sims' Legal Claims

Sims claims that Brown & Root is liable for sexual harassment pursuant to Title VII and La. R.S. § 51:2231. She claims that a hostile work environment existed at Brown & Root; and that Brossett's pre-employment conduct offering employment for sex and his decision to reduce her pay once it became clear to him that she would not have sex with him was *quid pro quo* sexual harassment.

Sims also claims that Brossett is liable for the state law torts of battery and intentional infliction of emotional distress. The battery allegedly occurred when Brossett patted Sims on the buttocks and when he "hugged" her neck. The intentional infliction of emotional distress tort allegedly occurred when Brossett called Sims' mother to ask personal questions about Sims' sex life; when Brossett propositioned Sims; when Brossett reduced Sims' wages because she would not engage in sex with him; when Brossett called Sims' apartment manager to meet with Sims; and when Brossett appeared at Sims' apartment at approximately 3:00 A.M. to 4:00 A.M. on two separate occasions. Sims claims that Brown & Root is liable for both of these torts under the theory of respondeat superior.

Finally, Sims claims that she was constructively discharged from her job. She argues that Brossett's behavior and the "attitude" of two other Brown & Root employees, who are also Brossett's relatives, caused her to resign from her position.

II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The court must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid* v. *State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

The party seeking summary judgment has the initial responsibility of informing the court of the basis for its motion, and identifying those parts of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). The moving party need not produce evidence negating the existence of a material fact, but need only point out the absence of evidence supporting the nonmoving party's case. *Id.* at 325, 106 S.Ct. at 2554; *Fontenot* v. *Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986). If the moving party carries his initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of a genuine issue of a material fact. This showing requires more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1355-56 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Id.; see Boeing Company* v. *Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) *(en banc)*. While the party opposing the motion may use proof filed by the movant to satisfy his burden, "only evidence — not argument, not facts in the complaint — will satisfy" the burden. *Solo Serve Corp.* v. *Westowne Assoc.*, 929 F.2d 160, 164 (5th Cir. 1991). "Unsworn pleadings, memoranda or the like are not, of course,

competent summary judgment evidence." *Larry v. White,* 929 F.2d 206, 211 n.12 (5th Cir. 1991), *cert. denied,* ... U.S. ..

Where the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. *International Short Stop, Inc.* v. *Rally's, Inc.,* 939 F.2d 1257 (5th Cir. 1991), *cert. denied,* 502 U.S. 1059, 112 S.Ct. 936 (1992). The nonmovant may defeat the motion by showing a genuine dispute of material fact or by showing that the moving party's evidence is so transparent that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party. *Id.* "Summary judgment is appropriate where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant." *Armstrong* v. *City of Dallas,* 997 F.2d 62, 67 (5th Cir. 1993).

III. ANALYSIS

A. Title VII[3]

1. Legal standard

Whether making out a claim for hostile work environment or *quid pro quo* type sexual harassment, a plaintiff must prove that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Jones* v. *Flagship Int'l,* 793 F.2d 714, 419-422 (5th Cir. 1986), *cert. denied,* 479 U.S. 1065, 107 S.Ct. 952 (1987). Failure to raise a genuine issue of material fact as to this element will result in dismissal of a plaintiff's claim on summary judgment. *Nash* v. *Electrospace System, Inc.,* 9 F.3d 401 (5th Cir. 1993). Because failure to take prompt remedial action

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[3] Sims also claims that Brown & Root violated Louisiana's sexual harassment law. La.R.S. 51:2231. This statutory scheme is a "mirror image" of Title VII. *See Fisher* v. *Farley,* 1994 WL90325 (E.D. La. 1994); *see also Bennett* v. *Coroon & Black Corp.,* 517 So.2d 1245 (La. App. 4th Cir. 1987), *writ denied,* 520 So.2d 425 (La. 1988). Thus, in addressing Sims' Title VII claim, this court is also deciding Sims' state law sexual harassment allegation.

is crucial to Sims' success, the absence of a genuine issue of fact on that subject will be decisive.

2. Prompt remedial action

a. Brown & Root's arguments

Brown & Root asserts that it had no knowledge of Brossett's behavior until Sims actually complained. Further, upon learning of Brossett's actions toward Sims, it took prompt remedial action to correct the problem. Thus, it argues that precedent and policy dictate that its corrective actions negate liability under Title VII. Citing *Carmon* v. *Lubrizol Corp.*, 17 F.3d 791, 795 (5th Cir. 1994) ("overwhelming evidence of the prompt and proper responses by Lubrizol" negated employer's liability under Title VII); *Nash*, 9 F.3d at 404 (5th Cir. 1993) (employer who undertook immediate investigation and transferred plaintiff to another department with no loss of pay or benefits, all within one week of plaintiff's initial complaint, took proper remedial action and was thus not liable under Title VII); *see also Garcia* v. *Elf Atachem North America*, 28 F.3d 446, 451 (5th Cir. 1994) (employer was not liable under Title VII because he immediately reprimanded the harasser, gave stern warning, and effectively ended any further harassment); *Dornhecker* v. *Malibu Grand Prix Corp.*, 828 F.2d 307, 310 (5th Cir. 1987); *cf. Cortes* v. *Maxus Exploration Company*, 977 F.2d 195, 199 (5th Cir. 1992) (employer did not take any remedial measures to protect the plaintiff); *Waltman* v. *International Paper Co.*, 875 F.2d 468, 481 (5th Cir. 1989) (reversal of summary judgment where there was some question whether the employer's remedial action, namely, requiring the supervisors to read its sexual harassment policy to their crews, was sufficient).

b. Sims' arguments

Sims remonstrates with two different arguments. First, Sims apparently asserts that the prompt remedial action element is inapplicable; she argues that the cases cited by Brown & Root are distinguishable on the grounds that the present case involves a supervisor, rather than a co-worker, who controlled the plaintiff's terms and conditions of employment. The necessary implication flowing from this argument, which the court will initially dispel, is

that Brown & Root is strictly liable for the acts of its supervisors. Second, Sims claims that a hostile work environment existed, even before the incidents between Brossett and Sims, which was so pervasive that Brown & Root either knew or should have known about it and taken measures earlier.

c. Title VII is not a strict liability statute

Sims's first argument, although drawing a somewhat interesting distinction upon first glance, is, upon closer examination, dubious at best, and severely misleading to the court at worst. In *Meritor Savings Bank, FSB* v. *Vinson,* 477 U.S. 57, 106 S.Ct. 2399 (1986), the Supreme Court left open the question of when an employer is liable for sexual harassment due to the acts of its employee. It made clear, however, that two distinct caveats were to be followed by the lower courts: (1) there are some limits on the acts of employees for which employers will be held responsible under Title VII and thus employers are not always automatically liable for acts of their supervisors; and (2) absence of notice to an employer does not necessarily insulate that employer from liability. *Id.* at 72, 106 S.Ct. at 2408.

Fifth Circuit jurisprudence is consistent with the Supreme Court's cautionary instruction. That is, employers may be held liable for the acts of their *agents. See Grant* v. *Lone Star Co.,* 21 F.3d 649 (5th Cir.), *cert. denied,* ..... U.S. ....., 115 S.Ct. 574 (1994); *see also* 42 U.S.C. § 2000e(b). Employers may escape liability, however, if, upon learning of the illicit behavior of the agent, prompt remedial action is taken. *Carmon,* 17 F.3d at 795; *Nash,* 9 F.3d at 404-405. Furthermore, it is the plaintiff's burden to prove that the employer failed to take prompt remedial action after notice. *Id.*

Sims misapprehends the nature of this analysis to be that an employer is *always* liable for the acts of its agents, when, in fact, it is correct to state that agency theory is only a mechanism — showing employer knowledge — which opens the door to employer liability. This door will quickly shut if the plaintiff can not prove that the employer also failed to take prompt remedial action. This conclusion is based upon a common sense interpretation of the

Fifth Circuit's recitation of the fifth element of a sexual harassment claim:

> [T]he employer knew or should have known of the harassment in question *and* failed to take prompt remedial action.

Jones, 793 F.2d at 719-720 (emphasis added). Thus, the conjunctive "and" makes certain that even if Sims is able to prove employer knowledge, such as the knowledge of Brown & Root through its agents, it must also prove that Brown & Root failed to take prompt remedial action.

d. Prompt remedial action element is applicable

Reviewing Sims' argument, she cites the following language from *Nash* in support of her argument that the prompt remedial action element is inapplicable when a supervisor, as opposed to a co-worker, sexually harasses an employee:

> As the offender in [the Supreme Court case of] Harris [v. Forklift Systems, Inc.] was the company president, the issue of respondant superior liability never arose. This case poses a more typical situation, in which the alleged offender, though in some ways a direct supervisor of Nash's work, was not responsible for the terms and conditions for her employment, for her work assignment within the company, or for hiring or firing decisions. The summary judgment record does not establish that anyone within the company hierarchy was aware of Nash's complaints against Sharp until she went to the personnel department on February 22, 1991. The record also contains no evidence that Sharp's conduct took place in public, under the eye of co-workers or supervisors. It thus appears that the company did not know nor should it have known of Sharp's offensive inquisitiveness about Nash until she complained to those with authority to address the problem.

Nash, 9 F.3d at 404. Sims' interpretation of this language is

> that the Court drew an implicit distinction here between those supervisors who have no control over the terms and conditions of employment (i.e., those who can hire, fire or give pay raises, etc) and those supervisors like BROSSETT who do have control over the victim's terms and conditions of employment.

Sims' Mem. Oppos. Summ. J., at 21-22.

In other words, Sims is arguing that in the circumstance that a supervisor is the harasser, the prompt remedial action element does not apply and the employer is thus strictly liable. *Nash* does not say so much as Sims would have the court believe. In fact, the court in *Nash* noted, immediately preceding the language cited by Sims, that:

> *Harris* does not, however, support the proposition that in all such cases, an employer will be held liable for a violation of Title VII. An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action.

Nash, 9 F.3d at 404. Thus, the Fifth Circuit has taken the position that Title VII is not a strict liability statute. Moreover, the jurisprudence shows that the prompt remedial action element has been applied even when supervisors were the alleged harassers. *See Garcia*, 28 F.3d at 448 (plant foreman was the alleged harasser); *Cortes*, 977 F.2d at 197 (immediate supervisor was the alleged harasser); *Waltman*, 875 F.2d at 479 (supervisor was the alleged harasser); *Jones*, 793 F.2d at 716 (Vice-President in charge of Personnel was the alleged harasser); *Fisher* v. *Farley*, 1994 WL90325 n.32 (E.D. La. 1994) (immediate supervisor was the alleged harasser; the court found that supervisors are subject to the respondant superior element); *Cuesta* v. *Texas Department of Criminal Justice*, 805 F.Supp. 451, 453 (W.D. Texas) (Regional Supervisor was the alleged harasser); *but see Ross* v. *Double Diamond, Inc.*, 672 F. Supp. 261, 274 (N.D. Texas 1987) (sexual harassment committed by a supervisor was imputed to the employer under strict liability theory). Once again, this is consistent with the Supreme Court's teachings in *Meritor Savings Bank, FSB*, which, it must be remembered, cautioned that employers are not "always automatically liable for sexual harassment by their supervisors." *Meritor Savings Bank, FSB*, 477 U.S. at 72, 106 S. Ct. at 2408.

e. Sims' counsel has misled the court

Next, it appears that Sims' counsel deceptively attempted to mislead the court into believing that the Supreme Court has set

forth a strict liability standard in cases where the supervisor is the harasser. To wit, in her brief Sims quotes the following language from *Meritor Savings Bank, FSB* as authoritative:

> [W]here a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.

Sims' Mem. Oppos. Summ. J., at 17 (quoting *Meritor Savings Bank, FSB*, 477 U.S. at 70, 106 S.Ct. at 2407). Incredibly, the quoted language is not the view taken by the Supreme Court, but merely a statement of the position taken by one of the litigants — which, importantly, was not adopted by the Supreme Court, but was, in fact, rejected. *Meritor Savings Bank, FSB*, 477 U.S. at 70-72, 106 S.Ct. at 2407-2408 ("we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors"). The court, try as it might, is unable to comprehend how this could have been inadvertently inserted by plaintiff's counsel — absent extreme neglect — in light of the fact that the sentence and paragraph began with obvious references to the EEOC's amicus curiae brief. The court would admonish plaintiff's counsel at this point, but unfortunately the story is not quite at its end.

Additionally, Sims cites and quotes *Vinson* v. *Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd sub nom, Meritor Savings Bank, FSB*, 477 U.S. 57, 106 S. Ct. 2399 (1986), for the proposition that "if the creator of the hostile work environment is a supervisor, then the employer need not receive any notice." Sims' Mem. Oppos. Summ. J., at 18. Although *Vinson* was affirmed by the Supreme Court in *Meritor Savings Bank, FSB*, the Court, as discussed above, explicitly rejected the very same notion. *Meritor Savings Bank, FSB*, 477 U.S. at 70-72, 106 S.Ct. at 2407-08.

Finally, a group of Fifth Circuit cases dealing with Title VII racial discrimination were cited by Sims in support of her strict liability argument. Sims' Mem. Oppos. Sum. J., at 2 n.1. This was

the wrong line of cases to cite in litigation involving sexual harassment, which has itself an entire large body of jurisprudence.[4]

f. Application of law to facts

Having decided that the prompt remedial action element is applicable, the court must next determine whether a genuine issue of material fact has been presented. Upon receiving notice of Sims' complaint in late February of 1993, the Human Resources Department of Brown & Root moved with commendable rapidity. On the day of Sims' complaint, Greg Conklin phoned Sims from his office in Houston. He listened to her allegations, assured her that he would thoroughly investigate her claims, that she would be paid back for any lost wages if her claims were true, and that she should let him know if anything further happened between her and Brossett. The following week another Human Resources representative, Ralph Morales, visited the jobsite to investigate Sims' claims. Morales interviewed Sims, Brossett, and other Brown & Root employees. When Morales spoke with Sims, he told her to let him know if anything further occurred during the pendency of the investigation.

During the investigation, Brossett requested that Sims perform a job task; Sims reported this to her immediate supervisors, Judy Ladner and Tracy Hood. Hood told Brossett that he was not to be alone with Sims and that Brossett should go through Hood if he needed any tasks done. Sims had no further contact with Brossett.

On March 10, 1993, approximately two weeks subsequent to Sims' complaint and four or five days after the conclusion of Morales' investigation, Brossett was terminated for violation of Brown & Root's sexual harassment policy. Sims was then restored to the position she had occupied previously, making $10 per hour. She also received, in full, the backpay of which she had been deprived since her demotion to $8 per hour. Incidentally, for its

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[4] The court also notes with irritation that plaintiff's counsel even failed to announce the proper summary judgment standard. Instead of referring mostly to the Supreme Court's trilogy of cases dealing with this subject, many older cases, some not even within this Circuit, were cited as authoritative. *See* Sims' Mem. Oppos. Summ. J., at 3-6.

actions, Brown & Root subsequently defended against an unsuccessful defamation suit brought by Brossett.

Sims has been unable to direct the court to any evidence contradicting the fact that Brown & Root took the aforementioned actions upon receiving Sims' complaint to the Human Resources Department. Rather, it is clear that Brown & Root

> took the allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigation. Holding a company such as [Brown & Root] liable after it has taken such action would produce truly perverse incentives benefitting no one, least of all actual or potential victims of sexual harassment.

Carmon, 17 F.3d at 795-796. Moreover, it is apparent that Brown & Root's sexual harassment policy, which provides a clear avenue for all abused employees by way of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency. Thus, in accordance with *Nash* and *Carmon,* Sims is apparently unable to make out a necessary element of her claim under Title VII.

g. Lack of knowledge of Brossett's prior conduct

The inquiry does not end here, however, because Sims argues that the prior acts of Brossett would tend to prove that Brown & Root knew or should have known of Brossett's behavior at a much earlier date and failed to take prompt remedial action at that point. Specifically, Sims alleges that at the UOP jobsite,[5] approximately one to two months before Sims was hired at the Olin jobsite and seven to eight months before Brossett was fired, Brossett acted similarly toward Lisa Acklin, Rose Coleman, and Judy Fife, female

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[5] The UOP jobsite refers to a project in Blanchard, Louisiana that Brown & Root had undertaken prior to the subject matter of this suit. Brossett allegedly committed acts of sexual harassment at this prior jobsite, also. The claimed relevance of his prior acts is that Brown & Root knew or should have known of Brossett's behavior well before Sims' complaint and should therefore have taken remedial action much sooner.

employees of Brown & Root. This group of acts is purportedly being offered not as character evidence, but to prove (1) that certain supervisors had notice of Brossett's behavior at this time; and (2) that Brossett's behavior was so pervasive that Brown & Root should have known about it. For the purpose of this Memorandum Ruling, the court will assume that this evidence is admissible under F.R.E. 404(b).

Harry Vonsenden was the foreman of the pipe department at the UOP jobsite. He was sometimes able to hire, usually able to fire, and always able to discipline employees. In his deposition testimony, Vonsenden states that although he never spoke to Rose Coleman, Lisa Acklin, or Judy Fife directly concerning Brossett's conduct toward them, he had heard rumors from other employees that Brossett had hit on them or asked them out. Deposition of Harry Vonsenden, at p. 10-14 (February 24, 1995).

Howard Beatty was an electrical crew foreman at the UOP jobsite. He had the ability, albeit somewhat limited, to hire, fire, and discipline employees. Deposition of Howard Beatty, at p. 42 (February 24, 1995). In his deposition testimony, Beatty states that Lisa Acklin told him that Brossett had asked her on several occasions to go to bed with him. *Id.* at p. 9. Also, Acklin said that Brossett told her it would be "worth her while." *Id.* at p. 10. Finally, Beatty states that supervisory personnel, namely foremen, knew about Brossett's pattern of attempting to have sexual relations with female employees. *Id.* at p. 23.

Carol Vonsenden was an electrical helper at the UOP jobsite; she married Harry Vonsenden just before the UOP job ended. She was not a supervisor, but simply an employee. In her deposition, she states that Rose Coleman told her that Brossett had asked Coleman out "two or three times" and that Coleman "just always laughed about it." Deposition of Carol Vonsenden, at p. 9 (February 24, 1995). Also, Judy Fife told her that Brossett had asked Fife to a motel "more than once," but "it didn't seem to bother" Fife; rather, Fife would "always kind of laugh about it . . . [m]ore like it was a joke . . . . " *Id.* at p. 12-13. Lisa Acklin, however, never mentioned Brossett's alleged behavior to Mrs. Vonsenden. She

further states that she told Mr. Vonsenden this information. *Id.* at p. 13-14.

Judy Fife was an office cleaner at the UOP jobsite. She states that on three occasions Brossett indicated that she was a smart woman who could go far in the company if she slept with him. Deposition of Judy Fife, at p. 10-11 (February 24, 1995). On these occasions, Brossett asked her to go to a motel, dinner, or the movies. *Id.* at p. 12-13. She found some of this conduct to be "offensive." *Id.* She told Carol Vonsenden and an unidentified tool room supervisor about these incidents. *Id.* at p. 11.

Although the court obviously does not condone the alleged actions of Brossett, it concludes as a matter of law that Brown & Root did not have knowledge of his conduct. The only supervisors who had heard "rumors" of Brossett's conduct were Harry Vonsenden, a low-level tool foreman, and Howard Beatty, a low-level electrical crew foreman. There is a notable absence of evidence, however, that a higher level supervisor or immediate supervisor had knowledge of Brossett's alleged conduct. Thus, the court will not impute Vonsenden or Beatty's knowledge of what each describes as "rumors" to Brown & Root.

As for Brossett's knowledge of his own conduct, it is possible that this could provide notice to Brown & Root through agency principles. The effect of this decision, however, would result in employers being held strictly liable in many typical situations; and the Fifth Circuit, as discussed above, has made clear that Title VII is not a strict liability statute. *Nash*, 9 F.3d at 404. For example, if a victim does not report harassment at all — as was the case with the women at the UOP jobsite — or waits for a lengthy period of time before reporting, the employer will never have an opportunity to engage in prompt remedial action and will thus be liable.

This would result not only in *de facto* strict liability for employers, but would encourage both the victim and the supervisor to be silent. That is, the victim's silence would be beneficial to her Title VII claim because it would severely limit the employer's opportunity to take *prompt* remedial action. Of course, the supervisor who engages in illicit conduct is unlikely to report himself.

This would, in turn, curtail the use of sexual harassment policies to aid thoughtful employees in rectifying the situation. Thus, the court will not impute Brossett's knowledge of his own alleged conduct to Brown & Root.

The discussion above concerned whether Brown & Root had actual knowledge of Brossett's prior conduct; the focus now shifts to whether Brown & Root had constructive knowledge. For Sims to prove that Brown & Root had constructive knowledge, she must show that a hostile work environment existed which was so pervasive that Brown & Root should have known about it. *Waltman*, 875 F.2d at 478; *Cuesta*, 805 F.Supp. at 455. No reasonable juror could find in favor of Sims on this issue. With the exception of one of Brossett's exchanges with Judy Fife, none of the alleged conduct nearly rises to the level of sexual harassment. Much of the evidence consists of Brossett asking female employees out on dates, albeit in a forward manner. Furthermore, no evidence has been presented that Rose Coleman or Lisa Acklin were in the slightest bit offended by Brossett's conduct. In fact, at least Coleman laughed about Brossett's conduct; also, although there is contradictory evidence, Fife also thought Brossett's conduct was laughable, "like it was a joke." Although Fife testifies that she was at least somewhat offended, this is simply insufficient for one to draw the conclusion that sexual harassment was so pervasive in the workplace that Brown & Root should have known about it.

3. Conclusion

When an employee complains that she has been sexually harassed, the employer must sail safely between Scylla and Charybdis as it faces the unenviable task of taking appropriate, lawful action toward both the alleged victim and the alleged wrongdoer. Indeed, Brown & Root's course has been perilous: Brossett brought a defamation suit against it subsequent to his termination and, obviously, Sims has brought suit in the present case. Nevertheless, Brown & Root acted as a responsible, exemplary employer by processing Sims' complaint swiftly, seriously, and, upon gathering the evidence in a thorough manner, decisively and justly. Sims was

placed back in her original position, given lost backpay, and Brossett was terminated. Thus, the court has no difficulty concluding that Sims failed to prove an essential element of her claim, that Brown & Root failed to take prompt remedial action upon receiving notice of Brossett's conduct.

Furthermore, the court holds that Sims has failed to raise a genuine issue of material fact whether Brown & Root had knowledge of Brossett's prior conduct at the UOP jobsite and failed to take prompt remedial action at that point. Therefore, Sims' Title VII claims are dismissed.

B. Constructive Discharge

To prevail on her constructive discharge claim, Sims must prove that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Borque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *see also Cortes*, 977 F.2d at 200; *Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd*, ____ U.S. ____, 113 S.Ct. 1250 (1993). Furthermore, she must "demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." *Landgraf*, 968 F.2d at 430.

The evidence, and lack thereof, compels the court to rule against Sims on this issue. Sims resigned on May 19, 1994, seventy days after Brown & Root terminated Brossett. Greg Conklin and Ralph Morales both made certain that Sims knew she should contact them if she had any further problems. Yet, Sims never complained. Sims admits that she had other employment lined up at the time of her resignation; there is evidence that this is the reason she left. Finally, and most importantly, Sims is unable to present any credible evidence that conditions were so intolerable that she was forced to resign. Rather, she can only state that she felt "awkward" due to the "attitude" of two Brown & Root employees — who are also Brossett's relatives — toward her following Brossett's termination. Therefore, the court concludes that Sims has presented insufficient evidence to create a genuine issue of material fact. *See Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (no

genuine issue of material fact created where the only evidence of discriminatory conduct was that the supervisor referred to Hispanic workers as "wetbacks" and "Mexicans").

C. State Law Tort Claims

Sims claims that Brossett committed the intentional torts of battery and intentional infliction of emotional distress. As pointed out by Brossett and Brown & Root in their briefs, however, these claims have prescribed. La. Civ. Code art. 3492 provides in pertinent part:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

The present suit was filed on April 15, 1994. All of the acts Brossett allegedly committed toward Sims occurred during Brossett's employment with Brown & Root. Brossett was terminated March 10, 1993, more than a year prior to the filing of Sims' suit.

In response to the defendants' motions for summary judgment on the prescription issue, Sims manages only this comment:

> Since the damage caused by BROSSETT did not cease after his discharge, then SIMS ought to be allowed a tolling of the prescriptive period until the date she left her employment which would be within the one year period.

Rec. Doc. 62, at p. 2 (citing *Waltman*, 875 F.2d at 476). Sims once again misstates the law. As pointed out by the Fifth Circuit in *Waltman* itself:

> The Louisiana Supreme Court has recognized an equitable exception to [the] prescription period, holding that "when the tortious conduct and resulting damages continue, prescription does not begin until the *conduct* causing the damage is abated .... Where the cause of the injury is a continuous one giving rise to successive damages, prescription dates from the cessation of the wrongful *conduct* causing the damage."

Waltman, 875 F.2d at 476 (quoting *South Central Bell Telephone* v. *Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982)) (emphasis added).

Thus, courts should look to the date the conduct abates, and not, as Sims suggests, to the date the damage abates.

As mentioned above, Sims has failed to present any evidence that Brossett engaged in any tortious conduct following his termination from Brown & Root. Therefore, the state law claims asserted by Sims against Brossett and Brown & Root as his employer are dismissed. Accordingly, Brossett's third party complaint against State Farm is also dismissed.

An order consistent with the terms of this Memorandum Ruling was previously issued on April 10, 1995. Rec. Doc. 68.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 10th day of June, 1995.

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JUDGE TOM STAGG